# Commentary

## 'I Paid For This Microphone' — When Does Ownership Of The Microphone Give You Ownership Of The Messages?

By
Jackie Ford

*[Editor's Note: Jackie Ford is a partner in the Columbus, Ohio office of Vorys, Sater, Seymour and Pease LLP, where she practices primarily in the field of labor and employment law, with a particular focus on privacy issues. She represents employers in defending all forms of employment-related claims in state and federal courts and agencies, develops and negotiates the full range of employment-related agreements, and works with employers to conduct internal investigations of alleged discrimination and harassment. She represents employers in a variety of industries, including retail, manufacturing, education and food service, among others. She can be reached at (614) 464-8230 or jjford@vorys.com. Copyright 2010 by Jackie Ford. Responses are welcome.]*

In what many historians view as a decisive moment in the 1980 presidential race, candidate Ronald Reagan established himself as a tough guy by fighting to keep his microphone turned on. The occasion was a debate in Concord, New Hampshire, between then-candidates Reagan and George H.W. Bush. Bush's strategy was to exclude all other candidates from the debate so that he could impress the crowd by taking on Reagan mano-a-mano. But Reagan's campaign had paid the cost of the hall, and once on stage, Reagan attempted to insist that other candidates be allowed to participate. When the moderator attempted to cut off Reagan's microphone for encouraging the other candidates to come to the stage, the future President barked, "I paid for this microphone, Mr. Green!" For reasons that may now seem a bit quaint, that remark — and the ensuing roar of approval from the crowd — made Reagan look like a decisive hero and Bush a weak schemer afraid to let his critics have their say. In the end, Reagan's property rights argument won the day, and a full debate ensued.

Today, electronic communications involve technologies much more complex than microphones, and it remains unclear whether mere ownership establishes the right to fully control the technology. Nowhere is this issue murkier than in the context of work-related communications. According to recent studies, some 40 percent of American workers perform at least some of their work duties from remote devices, whether purchased by themselves or their employers. Blackberries, pagers, cell phones, and similar devices allow employees to work from almost anywhere – from their homes, from their cars, from their so-called vacations, and from nearly anywhere else within range of a cell phone tower. Just as the technology used for work is rapidly changing, so too are our collective definitions of what it means to be "at work," and what it means to use a piece of equipment for "business purposes only."

A case now pending before the U.S. Supreme Court will test the limits of traditional thinking about the scope of employer authority by examining the privacy rights (if any) attached to employer-issued electronic equipment. Although the case involves a public employer (and therefore raises certain constitutional issues not applicable to private employers), it also will test whether the "I paid for it!" trump card will be enough to allow employers unfettered access to employee communications.

As is common in cases testing employee privacy rights, City of Ontario v. Quon has its roots in both broadly worded employer policies and foolish misconduct by an employee. In 2001, the city of Ontario, California, purchased two dozen alphanumeric two-way pagers. The pagers were then distributed to certain employees of the City, including members of its police department. While the city had no written policy specifically regarding use or inspection of the pagers per se, it did have a general policy indicating that "City owned computers and all associated equipment . . ., networks, Internet, e-mail, and other systems operating on these computers" should be used only for "City of Ontario business." The policy went on to prohibit the use of such systems for "personal benefit." It also stated that employees had no right or reasonable expectation of privacy in "network activity" and that the City reserved the right to "monitor and log" all such "network activity."

In 2002, Police Lieutenant Steve Duke informed officers that messages transmitted via the city-provided pagers were considered a form of "e-mail" and were therefore subject to the City's general e-mail policy. Among other things, Lieutenant Duke informed the officers that text messages would be considered public records and therefore be "eligible for auditing." According to the officers, however, Lt. Duke also said text messages would not be reviewed by the City as long as the officers individually paid any overage charges they incurred on their pagers.

Like other employees of the City's police department, Officer Jeff Quon signed off on the City's e-mail policy. He also "vaguely recalled" attending the meeting at which Officer Duke indicated that City-issued pagers were subject to the "no privacy" provisions of the City's e-mail policy.

The City paid a flat monthly rate to its third-party service provider for support of the pagers. That flat rate was in turn based on a set number of text messages sent each month on each pager. When any one officer exceeded the fixed number of messages, the City's practice was to have Lt. Duke inform that officer of the overage and request payment for the additional costs.

Sgt. Quon was often on the monthly list of officers with excessive texting charges. At the direction of the Police Chief — and without telling Quon — Lt. Duke requested from the service provider (Arch Wireless) transcripts of Sgt. Quon's messages to determine if the overages were due to work-related texting by Sgt. Quon or to personal use of the pager. Perhaps not surprisingly, the audit revealed that many of Sgt. Quon's messages were of a sexual nature in a manner that was "not business related." In Sgt. Quon's case, the messages included many sexually explicit messages to both his wife and his mistress.

Instead of hiding their heads in mortification once their "sexting" was discovered, Quon and his fellow officers did what many people now do when they're caught using company resources for sexual purposes: they sued the employer who had provided them with the tools to embarrass themselves in the first place. They also sued the service provider (Arch Wireless) that had provided their employer with the proof of its employees' misconduct. Specifically, they sued the City for breach of their privacy and claimed that the search of the pager records was unlawful under the search and seizure provisions of the Fourth Amendment. The officers also argued that they had a reasonable expectation of privacy in the content of the messages because of the City's past practice of letting officers pay for overages regardless of whether the charges were due to business or personal messages (and without any audit of the content of the messages). They additionally argued that the Stored Communications Act (SCA) barred Arch Wireless from disclosing the text messages to anyone — including the owner of the messaging device — without the senders' permission.

Initially, the City was successful in arguing that the officers had little if any reasonable expectation of privacy in information conveyed via their City-issued pagers. On appeal, however, the Ninth Circuit Court of Appeals sided with the officers, finding that the officers did indeed have a reasonable expectation of privacy in their work-phone text messages, and that expectation was breached by the City's "overbroad" audit of the messages. According to the Appeals Court, the "expectation of privacy" came from the City's history of not routinely reviewing the content of the text messages, even when the charges became excessive. The Court seemed to be suggesting that, once practiced, leniency must be permanent. Had the City never tried to treat the officers as adults who could be trusted

to use their work-issued pagers for work-related purposes, it would never have created any "expectation of privacy" — and, having once created it, the City also could not take it back. Instead, the Court's ruling suggests, the City should have micromanaged the pager use from the beginning, lest it forever lose its right to monitor the use of its own property.

The Quon case also presents another important question regarding an issue the Supreme Court declined to review: whether Arch Wireless violated the Stored Communications Act (SCA) by disclosing the text messages to the *owner* of the device without the consent of the *user* of the device. Under the SCA, an "electronic communication service" may only disclose such messages with the consent of the addressee or intended recipient of the message. Having had consent of neither Quon, his wife, his mistress, or any other recipient of the messages, the Court said, Arch Wireless was not free to disclose the information to the City. You can pay for the microphone, but you aren't necessarily allowed to review how it's been used. Because the Supreme Court declined to review that aspect of the ruling, the Ninth Circuit's decision on that point remains in effect.

While the privacy issues in the Quon case are in some respects specific to public employment, the Supreme Court's analysis may also provide guidance to employers and employees alike on the limits of work-related privacy. Almost all (if not all) of us have used work-provided e-mail and other platforms to send personal messages. The messages we have sent via e-mail and otherwise are subject to discovery in litigation and may be considered business records for a variety of purposes — yet may also be beyond the employer's reach if appropriate policy statements are not in place. While awaiting the Supreme Court's decision, employers would be well advised to review their electronic communications policies to ensure that they explicitly address all forms of electronic communication sent from or stored on company-provided devices. Based on the appellate court's analysis, "I paid for it" may not win the day. ■